

No. 16070

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX ANISIMOV TIGAN;

Appellant;

vs.

ARTHUR C. HOY, District Director, Immigration and
Naturalization Service.

Appellee.

APPELLANT'S OPENING BRIEF.

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vs.

RICHARD C. HOY, District Director, Immigration and
Naturalization Service,

Appellee.

APPELLANT'S OPENING BRIEF.

The appellant has appealed from a judgment of the United States District Court in favor of the appellee, Richard C. Hoy, District Director, Immigration and Naturalization Service. The appeal is from a judgment wherein the appellant was denied any relief following the filing of a petition wherein the appellant prayed that the appellee be restrained from executing an order for the appellant's deportation.

The plaintiff and appellant will be referred to herein as "appellant," and the defendant and appellee will be referred to as "appellee."

Statement of Facts.

The facts are simple. The appellant was born in the Philippine Islands in 1903, and entered the United States at Wilmington, California, on May 16, 1925. Since that time, he continually resided in the United States and was a permanent resident of the United States at all times

mentioned in these proceedings. On or about July 29, 1953, in the Superior Court of the State of California, in and for the County of Los Angeles, the appellant was convicted of a violation of Section 11500 of the Health and Safety Code of California (possession of a preparation of heroin, a narcotic). Thereafter, a deportation proceeding was commenced, and the appellant was ordered to be deported; but on June 11, 1954, the Board of Immigration Appeals ordered that the proceedings be terminated upon the grounds that the conviction did not constitute grounds of deportability under the provisions of Section 241(a)(11) of the Immigration and Nationality Act.

Thereafter, and on September 18, 1956, an Order to Show Cause was issued ordering the appellant to appear and show cause why he should not be deported from the United States because of the conviction hereinbefore referred to—that is, a violation of Section 11500 of the Health and Safety Code of California.

The latter deportation proceeding resulted in an Order of Deportation.

Thereafter, the Board of Immigration Appeals of the United States Department of Justice ordered that the appeal of the appellant be dismissed. Following the administrative remedies, the appellant filed a Petition for Review in the United States District Court praying that the appellee be enjoined from enforcing the Order of Deportation. The Order for the Findings of Fact, Conclusions of Law and Judgment and the Findings of Fact, Conclusions of Law and Judgment are found in the Transcript of the Record in this matter, pages 10 to 16.

Contentions on Appeal.

If the Philippine Independence Act of 1934 changed the status of the appellant from a citizen national to that of an alien, to therefore permit deportation for an offense committed under the laws of the State of California (which offense was not deportable when it was committed) it would be a violation of the Constitution of the United States as applied to the appellant, and therefore void.

The appellant will further rely for reversal of the judgment on the following points:

1. The Presidential Proclamation No. 2696 dated July 8, 1946, was a violation of and inconsistent with the supreme law of the land as stated in the Treaty of Paris of 1898:

2. The amendment of Section 241(a)(11) of the Immigration and Nationality Act effective on July 19, 1956, was prospective in its application, and not a basis for deportation of the appellant.

3. The appellant had a status of nondeportability which was saved in the saving clause of Section 405(a) of the Immigration and Nationality Act of 1952. Section 241, subdivision (d) of said act does not change the status of nondeportability.

4. If the Philippine Independence Act of 1934 changed the status of the appellant from a citizen national to that of an alien, to therefore permit deportation for an offense committed under the laws of the State of California (which offense was not deportable when it was committed) it would be a violation of the Constitution of the United States as applied to the appellant, would be a violation of the appellant's due process of law and his constitutional rights, and therefore void.

ARGUMENT.

I.

The Presidential Proclamation No. 2696 Was a Violation of the Treaty of Paris and Void.

By reason of the Treaty of Paris of 1898, Spain ceded the Philippine Islands to the United States (30 Stat. 1754). Article IX of the Treaty provided that “the civil rights and political status of the native inhabitants shall be determined by the Congress.” (30 Stat. 1759.)

That Treaty, when adopted by the Congress, became the supreme law of the land. It could only be constitutionally modified, altered or changed.

Article 6, United States Constitution, provides in part as follows:

“ . . . And all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”

Pursuant to Article 9 of the Treaty of Paris, the Congress declared in the Act of July 1, 1902, that Philipppines born in the Islands after 1899 were to “be citizens of the Philippine Islands and, as such, entitled to the protection of the United States.” (32 Stat. 691.)

The Philipppines, as nationals, owed an obligation of permanent allegiance to the United States.

The Philippine Independence Act of 1934, 48 U. S. C. A. 1244, stated the procedure by which complete independence of the Philippine Islands was to be accomplished. That Act was contingent upon action by the President of the United States.

The President of the United States, by Presidential Proclamation, caused the Act to become effective and self-

executing (Presidential Proclamation No. 2695, 60 Stat. 1352; Presidential Proclamation No. 2696, 60 Stat. 1353).

By so doing, the Presidential Proclamation was an unauthorized and unconstitutional exercise of legislative power and void.

Separately, the Presidential Proclamations hereinbefore referred to were inconsistent and without sanction, pursuant to the Treaty of Paris of 1898. The Treaty provided that the civil rights and political status of the native inhabitants shall be determined by the Congress. There is no authority, express or implied, found in the Treaty to authorize the President of the United States to change the political status of the "citizen nationals" permanently residing in the United States.

II.

The 1956 Amendment Did Not Furnish Any Grounds for Deportation of the Appellant.

Section 401 of the Act of July 18, 1956, Chapter 629, 70 Stat. 576, provided an amendment to Section 241(a)-(11) by adding illicit possession of narcotics to the other grounds of deportation found in such section. This section also amended other parts of the Federal Code, including Title 18, dealing with crimes and criminal procedure. There is no question but that the law could not be made retroactive and hence *ex post facto* with respect to the crimes and criminal procedure, and hence could not be separated to be made *ex post facto* with respect to deportation.

It is true that retroactive and *ex post facto* laws have been held by the Supreme Court not to be applicable to Immigration and Nationality laws. However, in this case, since the law covered criminal as well as quasi-criminal

procedures and was not expressly made retroactive, then the interpretation that must be placed upon this law is that it was purely prospective in its application. This is the only reasonable interpretation that can be placed upon the Act, and to allow conversely would do violence to all constitutional principles.

As stated in the case of *Del Guercio v. Gabot*, 161 F. 2d 559, 561:

“ . . . The law does not favor the retroactive application of statutes. Ex post facto application of criminal law is prohibited by the United States Constitution. Of course, the issue here is not concerned with the subject of ex post facto law, yet it approaches it in principle, for if the Director is right, the appellee is to be forceably deported only by the retrospective application of a law which has constituted a perfectly legal act, when done, a necessary element for the deportation.”

Del Guercio v. Gabot, 161 F. 2d 559, 561.

III.

The Appellant Had Achieved a Status of Nondeportability Insofar as the Conviction of Possession of Heroin Was Concerned.

Section 241(a)(11) of the Immigration and Nationality Act of 1952 did not include “possession” as one of the grounds for deportation. It also applied only to aliens, and not to nationals. The appellant was not deportable prior to that Act, nor at the time of the enactment of that Act. The Government alleges that he became deportable by reason of the 1956 amendment. Under the Immigration and Nationality Act of 1952, this status of nondeportability was preserved to him by the savings clause of Section 405(a) of that Act. It has been stated that Sec-

tion 241(d) specifically provides for deportation of an alien, notwithstanding that the offense for which he is being deported occurred prior to the 1952 Act. It is suggested that Section 241(d) relates to cases of deportation appearing in Section 241(a), where entry was a factor, since it specifically refers to entry.

If that be so, then Section 241(d) would not cover the case of deportability attributed to the appellant. That, hence, the savings clause of nondeportability under Section 405(a) of the 1952 Act would apply, making the appellant nondeportable.

Conclusion.

An examination of the entire record reveals a gross miscarriage of justice. The laws governing deportation were never intended to apply to citizen nationals of the United States. The appellant had achieved a status of nondeportability, and upon that ground and the others heretofore stated the judgment should be reversed.

Respectfully submitted,

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